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No. 88-1953

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOHN T. ATKINSON, JR., MARIE ATKINSON, HOMER L. OGDEN, AND ALL OTHER PERSONS SIMILARLY SITUATED,

Petitioners,

v.

GENERAL ELECTRIC CAPITAL CORPORATION,

Respondents.

On Petition for Writ of Certiorari To the United States Court of Appeals For the Eleventh Circuit

REPLY BRIEF OF PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Did the Eleventh Circuit Court of Appeals improperly adopt a presumption of federal preemption when, in construing choice of law provisions of mobile home contracts, it determined that the contracts were governed by federal law rather than state law on the sole grounds that the seller of the mobile homes charged an interest rate that was permissible under the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA") but not under applicable state law?

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REPLY BRIEF OF PETITIONERS

I. THE ELEVENTH CIRCUIT'S DECISION IS AN INCORRECT APPLICATION OF SETTLED PRECEDENT AND DOES CREATE A SUBSTANTIAL ISSUE FOR REVIEW BY THIS COURT.

This Court has, in deciding if Congress has preempted an area of the law by the enactment of a statute, determined preemption questions in the following ways:

1. Looked to whether Congress specifically stated that federal law would occupy a given field.

2. Looked to whether Congress intended that federal law occupy a given field.

3. Looked to whether state law actually conflicts with federal law, and compliance with both is impossible.

4. Looked to whether state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *California v. ARC America Corporation*, 490 U.S. ___ , 104 L.Ed. 2d 86 (1989) at 94-95.

> This Court recently reiterated: "When Congress legislates in a field traditionally occupied by the States, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 91 L.Ed. 1447, 67 S.Ct. 1146 (1947)."

California v. ARC America Corporation, 104 L.Ed. 2d 86, 94.

In the case at hand, Congress rather than expressing an intent that federal law occupy a given field, has given the drafters of contracts of adhesion the option of deciding by the "terms and conditions" of the contract whether they, the finance companies, want to fall within the federal scheme or fall within the state scheme. The terms and conditions of such contracts have to restrict the rights of acceleration, repossession, or foreclosure as set forth in DIDMCA § 501(c)(2) and 12 C.F.R. § 590.4(h) or the creditor will retain the right to immediately repossess upon default without notice. UCC Art. 9, § 503.

In the case at hand, the only way one can tell whether a contract is a "federal preemption contract" or a contract governed by the laws of the state, is to look at the language employed by the drafters of the contract of adhesion. There is absolutely nothing in the contract utilized by General Electric Capital Corporation (GECC) to indicate that it is a "DIDMCA" contract. The only justification that the Eleventh Circuit had for classifying this form contract as a DIDMCA contract was that the seller and GECC charged a finance charge in excess of that permitted by Georgia law. *Atkinson v. General Electric Credit Corporation*, 866 F.2d 396 (11th Cir. 1989) at 398, 399.

Historically, it has been up to the states, not the federal government, to determine what time price differentials or interest rates can be charged on certain transactions. In deciding whether or not state law is preempted, this Court has maintained that those seeking preemption have the burden, holding:

> "In this case, in addition, appellees must overcome the presumption against finding pre-emption of state law in areas traditionally regulated by the States. See *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 716, 85 L.Ed. 2d 714, 105 S.Ct. 2371 (1985)."

California v. ARC America Corporation, 104 L.Ed. 86, 94.

This same legal principle should be applied to those cases where Congress has given drafters of contracts the right to preempt restrictions imposed by state law by the "terms and conditions" of the contract.

In the case at hand, there is nothing in the language utilized by GECC in the four corners of its contract of adhesion which would indicate that it is anything other than a contract governed by state law. By UCC Art. 9 § 503, creditors have the right to repossess without notice; therefore, the same form contract cannot be used to evidence both federal preemption transactions and transactions governed by state law. Is GECC going to be given the right to claim the protection of UCC Art. 9, § 503 when it repossesses without notice and, then when brought to task about its high finance charges, claim the protection of DIDMCA when the same form contract is used?

II. THE CONTRACT IN ISSUE IS NOT ENTITLED TO FEDERAL PREEMPTION OF STATE LAWS UNDER DIDMCA ACCORDING TO ESTABLISHED PRECEDENTS CONSTRUING DIDMCA.

Contrary to GECC's statements on page 5 of its brief, this opinion is the fifth, not the fourth, in a line of opinions addressing the contractual provisions regarding a debtor's right to notice of default and right to cure with respect to the contract's being a federal preemption contract or a contract governed by state law. In *Doyle v. Southern Guaranty Corporation*, 795 F.2d 907 (11th Cir. 1986) at 911 Note 7, the Eleventh Circuit analyzed both Southern Guaranty's contracts and Fort Wayne Mortgage Company's contracts. These contracts did not contain language requiring notice before acceleration or foreclosure and the Eleventh Circuit held that these contracts were not entitled to preemption under DIDMCA.[1]

[1] The issue of whether or not subsequent amendments to the

GECC misconstrues the Eleventh Circuit decision in *Quiller v. Barclays America/Credit Co., Inc.*, 727 F.2d 1067 (11th Cir. 1984) reinstated on rehearing en banc, 764 F.2d 1400 (1985), cert. denied, 476 U.S. 1124 (1986) by arguing on page 5 of its brief that 12 C.F.R. § 590.4(h) only regulates "conduct of a creditor" and not the form of the contract. Arguments that 12 C.F.R. § 590.4(h) only regulate "conduct" subsequent to the contract completely ignore the mandate of Congress set forth in DIDMCA § 501(c)(2) itself, completely ignore the legislative history which provides that consumer safeguards are a condition to preemption, H. Conf. Rep. No. 96-842, 96th Cong., 2d Sess. 79, reprinted in 1980, U.S. Code Cong. & Ad. News 298, 309, completely ignore the preamble to the proposed regulations, Federal Register Vol. 45, p. 31122 and Vol. 45, p. 43681, and completely ignore the holdings in *Quiller*, 727 F.2d at 1072, and *Doyle, supra*. Furthermore, such arguments overlook Article 9, § 503 of the Uniform Commercial Code which gives a creditor the absolute right to repossess a mobile home upon default without notice *"unless otherwise agreed"*.

The dissent in *Quiller*, 764 F.2d at 1401, pointed out that Barclays America/Credit, Inc. had labeled the contract as a "Federal Preemption Contract". The

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Georgia Motor Vehicle Sales Finance Act and subsequent amendments to the Georgia Usury Statutes would act retroactively to defeat plaintiffs' causes of action was certified by the Eleventh Circuit Court of Appeals to the Georgia Supreme Court and was answered favorably to the consumers and adversely to the finance companies in *Southern Guaranty Corp. v. Doyle*, 256 Ga. 780, 353 S.E. 2d 510 (1987). That opinion was adopted by the Eleventh Circuit in *Doyle v. Southern Guaranty Corp.*, 818 F.2d 754 (11th Cir. 1987).

majority in *Quiller*, *supra*, looked to the terms and conditions, not the label. If the label "Federal Preemption Contract" does not make such a contract a federal preemption contract, how does the mere charging of finance charges in excess of the state law maximum make the contract a federal preemption contract?

In *Grant v. General Electric Credit Corp.*, 727 F.2d 1073 (11th Cir. 1984), en banc 764 F.2d 1404 (11th Cir. 1985) cert. denied, 476 U.S. 1124 (1986), GECC did not specifically provide in that form that Georgia law would govern the contract.[2] As stated in the dissent by Chief Judge Godbold and Judges Kravitch and Vance, "At best the language of the agreement is ambiguous". 764 F.2d 1411. In the case at hand, the terms and conditions selected were unambiguous; that is, the contract was to be governed by Georgia law.

On page 6 of its brief, GECC states that the Eleventh Circuit in *Moyer v. Citicorp Homeowners, Inc.*, 799 F.2d 1445 (11th Cir. 1986) reaffirmed the *Grant* approach in rejecting a challenge to similar specific language chosen by a finance company in a contract of adhesion. One of the form contracts involved in that case had a choice of law provision in which Citicorp called for the application of Georgia law. *Moyer, supra*, at 1451. The Eleventh Circuit held that that form was facially not entitled to preemption. As to the Harrison and Sanders types of forms, the Eleventh Circuit, in making the determination that those contract forms were not facially defective, relied upon

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[2] As Petitioners have previously argued in their Petition for Certiorari p. 18, there is no logical reason for *Grant, supra* and *Quiller, supra* being decided differently.

its construction of State law, UCC Art. 9 § 503. *Moyer, supra*, at 1450 N. 17. Moreover, in *Moyer* the Eleventh Circuit had before it an order granting summary judgment to the consumers against the finance company relating to only two of some fifteen form contracts used by that defendant in the State of Geōrgia where the District Court's ruling was based on specific arguments of facially defective contracts.[3] Cases involving the threshold issue of federal preemption based on the "terms and conditions" of the contract should not be decided on F.R.C.P. 12(b)(6) motions and with the exception of *Grant, supra*, and this case, have not been finally decided on F.R.C.P. 12(b)(6) motions.

III. THE DESIGNATION OF ONLY GEORGIA LAW AS THE GOVERNING LAW PRECLUDES THE APPLICATION OF FEDERAL LAW IN DECIDING THE ISSUE OF PREEMPTION.

GECC takes comfort in this Court's dictum in *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141, 157 (1982). In that case, however, the Federal Home Loan Bank Board, in promulgating regulations dealing with due on sale clauses, specifically provided in the preamble to those regu-

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[3] Subsequent to the Eleventh Circuit's opinion in *Moyer, et al. v. Citicorp Homeowners, Inc.*, the Moyer case was settled on behalf of a class of consumers who entered into in excess of 3,700 mobile home finance contracts in Georgia, including those form contracts utilized in evidencing the Harrison and Sanders contracts, the two forms that the Eleventh Circuit held were not facially deficient. The cases of *Quiller, supra*, and *Doyle, supra*, have also been subsequently settled on class wide bases for thousands of consumers in Georgia and other states. These settlements were approved by District Court Judges Anthony A. Alaimo and Dudley H. Bowen, Jr.

lations that it was the intent of the Federal Home Loan Bank Board to preempt state laws to the contrary and for such clauses to be governed *exclusively* by Federal law. 458 U.S. 158. In the case at hand, the Federal Home Loan Board stated just the opposite in the preamble to the consumer protection regulations, stating that if a contract did not comply with the consumer protection regulations being promulgated, that the contract would be subject to state usury law attack. *Federal Register*, May 20, 1980, Vol. 45, p. 31122, and June 30, 1980, Vol. 45, p. 43681.

In the *Fidelity Federal* case, this Court was not faced with a preemption issue in which Congress granted to the drafter of a contract of adhesion the right to select whether or not the contract fell within the federal scheme or the state scheme. In the case at hand, GECC had the right, in drafting its contracts of adhesion, to choose to be governed either by federal law or by state law. The rights given creditors by UCC Art. 9 § 503 and the rights given consumers by DIDMCA § 501(c)(2) and 12 C.F.R. § 590.4(h) do not mesh. It would have been a very simple matter for GECC, the drafter of this contract, to provide in the contract the following:

> "In the event of nonpayment or other default, if (1) Buyer is given written notice of default and right to cure and (2) fails to cure the default as provided herein within 30 days of its postmarked date, then Seller may thereafter accelerate Buyer's indebtedness, repossess the Manufactured Home and/or foreclose. Seller does not have to give such

> notice more than twice in any one year or if the Manufactured Home is abandoned."

Arguments that some aspects of the contract that are not covered by DIDMCA are still governed by State law could be clarified by GECC's providing in the choice of law paragraph in part:

> "Both Buyer and Seller agree that they will each have the rights set forth in the Depository Institutions Deregulation and Monetary Control Act of 1980 and the Consumer Protection Regulations set forth at 12 C.F.R. § 590.4 et seq. Any aspect of this contract not governed by these federal laws and regulations will be governed by Georgia law."

By specifically providing that the *only* applicable law would be Georgia law, GECC made the election not to take advantage of the federal preemption scheme and not to be restricted in its rights to accelerate, repossess, or foreclose as restricted by federal law. While choice of law stipulations in adhesion contracts should be awarded special treatment so as to avoid injustice to the weaker or adherent party, it is contrary to all known principles of contractual construction to ignore choice of law provisions selected by the drafter when they are against the interest of the drafter. *Restatement, Conflicts of Laws,* 2d § 187b, 16 *Am. Jur. 2d, Conflict of Laws,* § 79. When questions of preemption are to be decided by contractual language, the same principles developed in deciding preemption cases based upon statutory or regulatory language should apply as well as the legal maxim that contracts of adhesion are construed against the drafter.

CONCLUSION

The Petition for a Writ of Certiorari presents to this Court an important question of federal law regarding federal preemption that needs to be decided by this Court. For this reason, and for those reasons set forth in the Petition for Writ of Certiorari and in this reply brief, Petitioners respectfully request that this Court grant the Petition.

Respectfully sumbitted,

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